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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/802,745	03/18/2004	Tuan Q. Tran	07860004US	5337

7590 10/19/2004

McGuire Woods LLP  
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EXAMINER

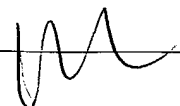
PATEL, NIHIR B

ART UNIT PAPER NUMBER

3743

DATE MAILED: 10/19/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/802,745	Applicant(s) TRAN ET AL. 	
	Examiner Nihir Patel	Art Unit 3743	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 10.06.2004.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) 4, 6, 10, 11, 13, 14 and 23 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3, 5, 7-9, 12 and 15-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |                                                                                                                        |                                                                                         |
|------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                            | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____                                                |

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election with traverse of claims 1-3, 5, 7-9, 12, and 15-22 in the reply filed on October 6<sup>th</sup>, 2004 is acknowledged. The examiner agrees with the applicant arguments in reference to figure 18 being grouped with figures 14-17 and claims 1 and 12 as being generic.

Claims 4, 6, 10-11, 13, 14 and 23 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on October 6<sup>th</sup>, 2004.

The requirement is still deemed proper and is therefore made FINAL.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claim 1 is rejected under 35 U.S.C. 102(e) as being anticipated by Mendenhall US Patent No. 6,772,754. Referring to claim 1, Mendenhall discloses a breath actuated nebulizer controller apparatus and method that comprises a top flow path (see figure below); a conduit 16 with an end in communication with the top flow path and an end configured to communicate with a nebulizer 14 (see figure below); a connection port 16A on the conduit 16 configured to reversibly attach to a nebulizer 14 (see figure below); a nebulizer in-flow path disposed within

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the conduit configured to communicate with a nebulizer (see figure below); and a nebulizer out-flow path 8 disposed within the conduit 16 configured to communicate with a nebulizer and top flow path, wherein the nebulizer out-flow path is separate from the nebulizer in-flow path (see figure below).

Referring to claim 2, Mendenhall discloses an apparatus wherein the top flow path is configured to direct a flow path into a patient's lungs (see column 1 lines 55-60).

Referring to claim 3, Mendenhall discloses an apparatus wherein the top flow path further comprises a vent inlet configured to direct a flow path into the top flow path (see column 3 lines 59-67).

Referring to claim 5, Mendenhall discloses an apparatus wherein the nebulizer in-flow path is configured to direct flow into a nebulizer, and the nebulizer out-flow path is configured to direct flow out of the nebulizer (see figure below).

Referring to claim 7, Mendenhall discloses an apparatus wherein the connection port is configured to reversibly sealably attach to a nebulizer (see figure below).

Referring to claim 8, Mendenhall discloses an apparatus wherein the nebulizer is configured to aerosolize a substance into a gas (see figure below).

Referring to claim 9, Mendenhall discloses an apparatus wherein the gas comprises air.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 12, 15, 16, 17, 18, 19, 20, 21 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mendenhall US Patent No. 6,679,250 in view of Walker et al. US Patent No. 6,679,250. Referring to claims 12, 16, 17, 19, 20, 21 and 22, Mendenhall discloses the applicant's invention as claimed with the exception of providing a baffle at least partially disposed within the hollow body.

Walker discloses a combination inhalation therapeutic and exhalation measuring device that does provide a baffle at least partially disposed within the hollow body. Therefore it would have been obvious to modify Mendenhall's invention by providing a baffle at least partially disposed within the hollow body in order to have better control of delivering required amount of medication.

Referring to claim 15, Mendenhall discloses the applicant's invention as claimed with the exception of providing a baffle that comprises a substantially planar member disposed between the intake flow path and the delivery flow path.

Walker discloses a combination inhalation therapeutic and exhalation measuring device that does provide a baffle that comprises a substantially planar member disposed between the intake flow path and the delivery flow path. Therefore it would have been obvious to modify Mendenhall's invention by providing a baffle that comprises a substantially planar member disposed between the intake flow path and the delivery flow path in order to have better control of delivering the required amount of medication.

Referring to claim 18, Mendenhall discloses the applicant's invention as claimed with the exception of providing a baffle that is configured to direct the intake flow path out of the hollow

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body and into a chamber connected to the connection port, and the baffle is configured to direct the delivery flow path from a chamber connected to the connection port into the hollow body.

Walker discloses a combination inhalation therapeutic and exhalation measuring device that does provide a baffle that is configured to direct the intake flow path out of the hollow body and into a chamber connected to the connection port, and the baffle is configured to direct the delivery flow path from a chamber connected to the connection port into the hollow body.

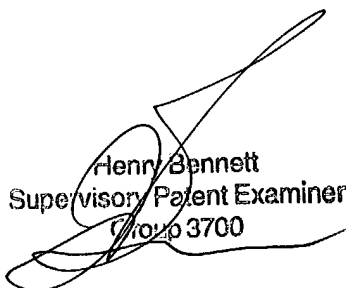
Therefore it would have been obvious to modify Mednenhall's invention by providing a baffle that is configured to direct the intake flow path out of the hollow body and into a chamber connected to the connection port, and the baffle is configured to direct the delivery flow path from a chamber connected to the connection port into the hollow body in order to have better control of delivering the required amount of medication.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Any inquiry concerning this communication or earlier communication from the examiner should be directed to Nihir Patel whose telephone number is (703) 306-3463. The examiner can normally be reached on Monday-Friday from 7:30 am to 4:30 pm. If attempts to reach the examiner by telephone are unsuccessful the examiner supervisor Henry Bennett can be reached at (703) 308-0101.

NP  
October 13<sup>th</sup>, 2004

  
Henry Bennett  
Supervisory Patent Examiner  
Group 3700